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1972

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## Recommended Citation

Harold D. Smith, *Arbitration of Right of Employee to Self-Expression*, 21 Clev. St. L. Rev. 162 (1972)  
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## *Arbitration of Right of Employee to Self-Expression*

Harold D. Smith\*

THE CONFLICTING INTERESTS DEALT WITH BY ARBITRATION CASES summarized in this paper involve management's right to direct an employee's behavior and the employee's right to retain control over his behavior. Many arbitrators attempt to balance these interests on the theory that (1) an individual's rights are modified to some extent when he voluntarily accepts those responsibilities which accompany his entering an employee relationship; and (2) a contractual right to discharge for just cause, does not equip the employer with an *absolute* right to direct the employee to do or not to do anything which the employer feels would promote the goals of the enterprise.<sup>1</sup>

### **Early Arbitration and the Management Rights Doctrine**

One type of individual interest that comes in conflict with the employer's interest is the employee's right to change wearing attire and hair styles as the social norms change. Standards as to what constitutes unacceptable conduct or attire change with the times. Not many years ago employees were subjected to rigid work rules and contract restrictions with regard to personal appearance and proper wearing apparel. For example, in the 1920's females were not permitted to work in many plants if they wore their hair bobbed, and in the 1930's some plants refused to allow women to work in slacks.<sup>2</sup>

A female employee was disciplined in a 1956 case for persisting in wearing a dress after being told to wear jeans. The arbitrator overruled the discipline, since the posted rule requiring jeans had not been enforced consistently but it was made clear that management had the right to set standards for appropriate attire. In his decision Arbitrator Pearce Davis said the company has every right to require all female employees to wear jeans for reasons of "decorum" "appropriate dress", or "ethics".<sup>3</sup> It is interesting to note that no mention was made of any requirement that the restrictions be related to the job, which we will see as a requirement in later decisions.<sup>4</sup>

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<sup>1</sup> *Giles and Ransome Corp. v. Int'l. Operating Eng'rs. Local 542*, 1 CCH 1970 Lab. Arb. Awards § 8319 (May 16, 1969).

<sup>2</sup> *Mitchell-Bentley Corp., v. UAW Local 743*, 1 CCH 1966 Lab. Arb. Awards § 8141 (Dec. 31, 1965).

<sup>3</sup> *Lawrence Bros. Inc. v. United Steelworkers Local 1140*, 28 Lab. Arb. 83 (1956).

<sup>4</sup> *Imco Container Co. v. Textile Workers Union*, 1 CCH 1971 Lab. Arb. Awards § 8007 (May 22, 1970); *Allied Employees Inc. v. Retail Clerks Union Local 1105*, 55 Lab. Arb. 1020 (1970); 4 BNA LABOR POLICY AND PRACTICE, PERSONNEL MANAGEMENT 203:331 (Supp. 216).

In the 1950's it appeared that strict work rules were supported by arbitrators on the basis of management's rights. In a 1954 case involving "just cause" where a contract that failed to limit the employer's right to discharge, but expressly limited the grievance and arbitration procedure, an arbitrator held that an employer had a right to discharge with or without "just cause".<sup>5</sup>

In a book by Russell Smith, James C. Phelps of Bethlehem Steel is quoted as follows:

When we speak of the term "management's rights" . . . we are referring to the residue of management's pre-existing functions which remains after the negotiation of a collective bargaining agreement. In the absence of such an agreement, management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law . . . In general, the process of collective bargaining involves an attempt by a labor union to persuade an employer to accept limitations upon the exercise of certain of his previously unrestricted managerial rights. To the extent that the union is unsuccessful in persuading an employer to agree to a particular demand, management's rights remain unlimited.<sup>6</sup>

Russell Smith also points out that it is reasonably clear that the United States Supreme Court has rejected the long standing reserved rights doctrine in the case of *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). His reasoning was that the lower courts in the *Warrior* decision, accepted the view that the reserved rights doctrine can have only one meaning where there is silence in a labor agreement, that is to give management unfettered discretion. In reversing the lower courts, the Supreme Court held that silence in a labor contract may have more than one meaning. In other words, when the Supreme Court ordered the parties to arbitrate, the court by implication rejected the view that the lack of any explicit provision in the agreement covering subcontracting necessarily gave management complete control over the matter.<sup>7</sup>

It is obvious from the 1950 cases that management was successful in getting arbitrators to uphold its very strict rules regarding personal appearance under the management's rights doctrine. After the *Warrior* decision, the 1960's saw a change in attitude on the part of the arbitrators in the management's rights area.

Arbitrators began to water down management's right to establish rules with regard to employee appearance, however it should be noted that even with this change of attitude many arbitrators and writers continued to emphasize the need for work rules in industry. In a 1963 speech comparing the criminal law and industrial discipline

<sup>5</sup> *Okenite Co. v. IBEW Local B-1001*, 22 Lab. Arb. 756 (1954).

<sup>6</sup> R. SMITH, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 307-08 (1970).

<sup>7</sup> *Id.* at 311-12.

as sanctioning systems, Sanford Kadish told the National Academy of Arbitrators that:

The general community, to the extent it is libertarian, places a high value on personal freedom. It is committed to a wide margin for non-conformity and to the maintenance of fluid social conditions to allow individuals themselves to find their own levels of preferred conduct and values. The ultimate sanction of criminal punishment, because of its severity, its moral stigma, and its overall compulsiveness, is therefore thought inappropriate except to support the minimum social conditions of order necessary to allow men to pursue their own alternatives of fulfillment. In an industrial community, on the other hand, the social values are imposed by the nature of the enterprise—an efficient and profitable operation . . . . It is not and cannot be a wholly libertarian community; it is a special purpose community with a job to do. Hence, the very effectiveness of industrial punishment in coercing compliance is not viewed as a limitation on its use so long as the behavior regulated has justifiable relevance to the needs of the enterprise.<sup>8</sup>

In another speech before the National Academy of Arbitrators, G. N. Alexander stated that management is entitled to cooperation from its working force and should not be required to retain in its employ persons who over a period of time demonstrate by their conduct that they cannot conform to reasonable shop rules.<sup>9</sup>

### Emerging Employees' Rights

In the 1960's, management turned its attention to beards, mustaches, sideburns, and long hair of the male employees. Management's attempts to set standards in the area for its male employees resulted in a marked increase in arbitration cases, particularly for those employees who dealt with the public.<sup>10</sup>

Another area where arbitrators were called upon to balance interests between the employer's right to control employee behavior and the employee's individual right to retain control of his behavior was in the use of obscene language and the wearing of mod clothes to work. It became obvious rather quickly that where dress codes were involved, management was in a difficult position, particularly when styles were changing radically. An arbitrator, in one of his decisions, mentioned that the wife of a prominent senator had appeared in a mini-skirt at a White House function when the invitation prescribed floor-length gowns; he noted that it is apparent that individuals are capable of extraordinarily strong convictions where fashion is involved. The arbitrator also said that style trends would find their way into the work place unless the employers establish clear, and reasonable standards.<sup>11</sup>

<sup>8</sup> *Id.* at 354.

<sup>9</sup> *Id.* at 385.

<sup>10</sup> 4 BNA LABOR POLICY AND PRACTICE, PERSONNEL MANAGEMENT 203:331 (Supp. 216).

<sup>11</sup> *Canteen Corp. v. United Catering Local 1064*, 52 Lab. Arb. 781 (1969).

The middle 1960's showed a marked trend away from arbitrators' support of management's right to discipline for hair styles and wearing attire simply because they were unacceptable to management. Arbitrators began to develop a set of criteria which management was required to meet before discipline would be supported. In a 1965 decision it was held improper for a company to send two women home for wearing short shorts. Discipline in this case was based on a rule which prohibited reporting for work in unsuitable attire. The arbitrator said that the Company had been so permissive on the matter of shorts that it could object only if the shorts were indecent or unsafe.<sup>12</sup>

Decisions in 1960 began to show an increase in union arguments that employees have a "personal" right to wear certain styles of clothing. Arbitrator M. S. Ryder accepted this argument in the "short shorts" case when he held that so long as they did not lend to indecency in appearance, female employees in a plant had a personal right to wear short shorts while performing their assigned jobs.<sup>13</sup>

In the early 1960 decisions, arbitrators had a tendency to favor reinstatement of employees discharged for wearing long hair and "mod" attire but only on condition that: (1) they abide by standards prescribed by the arbitrators (2) or that they dress similar to the way they appeared at the arbitration hearing. For example, a male employee who was discharged for wearing boots, clinging orange-brown pants with over-sized belt and buckle, and long-flowing haircut was given a second chance after he showed up at an arbitration hearing with a haircut and a manner of dress that in the arbitrators words "presented the very epitome of the more mundane accepted norm befitting a manifest dispatching clerk in the shipping industry."<sup>14</sup> The reinstatement was conditioned on:

(a) that the grievant shall in all respects abstain, refrain and desist from his former mode and manner of attire, hair styling and general appearance during working hours and the performance of his job duties; and (b) that the said grievant shall at all times during work hours and the performance of his job duties maintain and present the well-groomed appearance and mode of attire comparable and consistent with that which he exhibited at the arbitration hearing as his intended general work appearance and manner of attire in the future. Failure of the grievant to abide by the terms and conditions shall constitute a valid basis for his termination.<sup>14a</sup>

Later cases will show that arbitrators no longer set this type of restrictions as basis for reinstatement.

<sup>12</sup> Mitchell-Bentley Corp. v. UAW Local 743, 1 CCH 1966 Lab. Arb. Awards § 8141 (Dec. 31, 1965).

<sup>13</sup> *Id.*

<sup>14</sup> American Export-Isbrantsen Lines, Inc. v. Office Employees Local 153, 1 CCH 1967 Lab. Arb. Awards § 8052.

<sup>14a</sup> *Id.*

Even though arbitrators began to be more cognizant of employees' personal rights in the 1960's, as late as 1967 arbitrators were still emphasizing that employees had given up a certain amount of personal rights when they accepted a job. For example, in a case involving the Dravo Corporation, Arbitrator W. B. Wood held that any personal liberty the grievants in that case might have had to wear a beard was limited by certain restrictions which existed as conditions of employment. He also emphasized that if the men believed the rule was improper, they should have obeyed it and taken their protest through the grievance procedure.<sup>15</sup> This was the general view of arbitrators prior to the late 1960's. In another 1967 decision discharge was upheld for violating a plant rule requiring that hair be neatly combed and conservatively styled. The grievant was a grocery clerk and also a member of a rock and roll quintet. Arbitrator David Johnson recognized the grievant's right to wear his hair as he saw fit; however, the arbitrator said in that instance he chose to wear his hair more in line with his career as a musician.<sup>16</sup> The rationale of course is that the grievant chose between two occupations when he refused to cut his hair in accordance with the grocery store regulations. However, more recent cases indicate that arbitrators are less inclined to insist that employees cut their hair first and submit a grievance later.<sup>17</sup>

The latter part of the 1960's saw a further change in arbitrator's attitudes. The age of the protestors began to hit industry near the end of the 60's and in the early 70's. One might expect this new work force to attempt to exercise more individual rights. In 1969 Arbitrator M. David Keefe acknowledged the arrival of the new work force when he said:

This is the age of the "protestors". Not only in our American Society, but throughout the world, nations are convulsed to varying degrees with the fever of fervent "againststers"<sup>18</sup>

The 1960's showed us much unrest, including protests on college campuses and demonstrations throughout many cities. There was a marked increase in instances where individuals claimed constitutional rights to demonstrate and protest. It is only logical that beginning near the end of the 60's we saw an increase in employees in industry demanding protection of their constitutional right to free speech, the right to dress as they pleased and to wear the hair style of their individual choice. The arbitrators were faced with many new arguments claiming violations of constitutional and civil rights in discipline cases.

<sup>15</sup> *Dravo Corp. v. Marine and Shipbuilding Workers Local 61*, 1 CCH 1967 Lab. Arb. Awards § 8293.

<sup>16</sup> *Stop and Shop Inc. v. Retail Clerks Local 919*, 1 CCH 1968 Lab. Arb. Awards § 8040 (Nov. 12, 1967).

<sup>17</sup> *Dravo-Doyle Co. v. Operating Eng'rs Local 66*, 54 Lab. Arb. 604 (1970).

<sup>18</sup> *Canteen Corp. v. United Catering Local 1064*, 52 Lab. Arb. 781, 789 (1969).

Problems created by the "new work force" are expected to continue. According to a panel of union and management lawyers at the annual meeting of the American Bar Association, a changing labor force, with the accent on younger workers, will be an important part of labor relations problems in the 70's. It was stressed that during the 70's, persons below 33 years of age will constitute one-half of the labor force.<sup>19</sup>

In a recent speech, a union spokesman claimed that one reason for employees demanding more individual freedom is that some manufacturers associations have told them that if they do not stand up and fight for individual freedom they will become a tool of the union.<sup>20</sup> For whatever reason, it is obvious that employees are demanding protection of their individual rights and arbitrators are faced with balancing these individual rights against management's right to control employees' behavior.

### **Standards for Discipline**

The rationale used by arbitrators in deciding cases involving personal appearance and wearing apparel varies widely but it seems clear that management's right to set standards is still recognized. However, whether management will be upheld in disciplinary actions in this area appears to depend on whether the standards meet the arbitrators view of reasonableness.

In dealing with discipline for violation of dress and grooming standards, arbitrators have made these points:<sup>21</sup>

1. The standard must be clear, unambiguous and consistently enforced.
2. The standard must be reasonably related to a business need of the company, although it is recognized that "business need" includes the need to keep employees from being distracted by outlandish or overly revealing attire.
3. The standard must be reasonably attuned to contemporary mores and attitudes toward dress and grooming. As styles change, the standard may have to change.

In a hair suit involving United Parcel Service, Arbitrator Leo Kotin set the following standards:

1. Sideburns shall not extend beyond the bottom of the ear.
2. Sideburns shall be of a uniform width throughout their length, shall be in a straight line perpendicular to the horizontal plane of the head, and be well-trimmed so as to avoid the appearance of being bushy.
3. Hair styles should be of such type as to avoid having any part of the ear covered.

<sup>19</sup> BNA, LABOR RELATIONS YEARBOOK, 102-03 (1970).

<sup>20</sup> *Id.* at 222-25.

<sup>21</sup> 4 BNA LABOR POLICY AND PRACTICE, PERSONNEL MANAGEMENT 203:331 (Supp. 216).

4. Hair shall be kept neatly trimmed on the sides and in the back and shall extend downward on the back of the head no further than a line one-half inch above the collar.<sup>22</sup>

Arbitrator Kotin's standards were upheld in the discharge of a route salesman by Pepsi Cola General Bottlers, Inc., in May 1970. Arbitrator Marlin Volz said the rule represents a middle ground between the concern of the employer to protect and improve its image with the public and the preference of the employee for self expression and individuality. He went on to say that "... an employee who deals with the public and solicits sales has an added responsibility of presenting a pleasing appearance".<sup>23</sup>

The union in this case presented a novel argument in stating that the grievant's hair style was in line with the "now" generation — the company caters in its advertising to the "now" generation. The arbitrator's rationale was that the contract was silent on the question of grooming, therefore, the primary question concerned the reasonableness of the company's rules and regulations pertaining to personal appearance. The arbitrator indicated that a good appearance to the public was important to all employees where it involves impression of customers. He said, "... the economic well-being of the company is, of course, vital to the employees as well as to management."<sup>24</sup> The decision in this case seems to point out that the employee gave up a certain amount of personal rights when he accepted the job. The arbitrator apparently was concerned about how his appearance would affect other employees.

It should be noted that the Kotin and Volz decisions involved jobs where employees came in contact with the public. In a March 1970 decision Arbitrator Samuel Kromsby held a discharge to be improper where the employee refused to shave his beard and to cut his long hair in violation of a plant rule. The arbitrator said, application of the rule to the grievant would be unreasonable since it appeared that he worked in an area which was so isolated that any contact with others was extremely rare. As a matter of fact the evidence indicated that the grievant had not been subject to any complaint or adverse criticism by any customer or fellow employee. The arbitrator also held in this case that the grievant did not have to comply first and then grieve later as the status quo between grievants' rights and the company's order could not be regained within a reasonable time.<sup>25</sup> In other words, it may take months to regrow the long hair and beard. This is a departure from the usual rule that an employee has to obey a reasonable order and file a grievance if he believes the order to violate contractual provisions. One arbitrator in 1970 went so far as to say that an employee is not required to

<sup>22</sup> United Parcel Service v. Teamsters Local 396, 53 Lab. Arb. 126 (1969).

<sup>23</sup> Pepsi Cola Gen. Bottlers, Inc. v. Brewery Local 20, 55 Lab. Arb. 663, 664 (1970).

<sup>24</sup> *Id.* at 666.

<sup>25</sup> Dravo-Doyle Co. v. Operating Eng'rs Local 66, 54 Lab. Arb. 604 (1970).



follow an order which he reasonably believes to expose him to undue hazards or which is a direct invasion of his personal life unrelated to the demands of his job. It was on this basis that he held an employee did not have to switch from sandals to safety shoes while processing a grievance.<sup>26</sup>

Arbitrators are consistent in upholding management's right to make reasonable rules governing the appearance of its employees when there is an extensive need to rely on public trust for business. In a decision involving Western Airlines,<sup>27</sup> Arbitrator Charles Steese commented on the public association of long hair with irresponsibility. He pointed out that most men involved in violence on T.V., have long hair and/or beards. He said that a majority of the public has come to associate long hair and beards with irresponsibility. He noted that any competitive edge for airline companies involves service and the appearance of its employees because fares and equipment are the same or similar. He went on to say that to permit an appearance of long hair and beards could be detrimental to the company and its business.<sup>28</sup>

### **Safety and Product Quality as Factors**

Arbitrators are also quick to uphold discipline where a safety rule is involved. In a 1969 case Arbitrator William Bothwell held that an employer was justified in refusing to allow an employee to work until he complied with a supervisor's order to trim his beard. The rule in question banned the wearing of loose fitting clothing or bracelets and necklaces or long unprotected hair while operating a machine. The arbitrator said the rule was reasonably applied to beards as well as to hair and it did not completely prohibit the wearing of beards. The employee was not being unreasonably restrained in his conduct or dress so long as there was a reasonable relation between what is required and what is safe.<sup>29</sup>

Arbitrators will not support discipline based on a safety rule when the rule is applied discriminatorily. In the case involving the IMCO Container Company, Arbitrator Peter Florey held that management could contrive whatever rules it deemed necessary for safe shop practices, but such rules had to be reasonable—not based on someone's dislike of a certain mode of attire. In that case the plant safety committee after noting the grievant was wearing sandals came up with the requirement that employees working in his area had to wear safety shoes. The rule for safety shoes was initiated allegedly for the safety of employees who handled 230-pound drums. When the rule was put into effect a long haired employee was wearing sandals

<sup>26</sup> *Imco Container Co. v. Textile Workers Union*, 1 CCH 1971 Lab. Arb. Awards § 8007 (May 22, 1970).

<sup>27</sup> *Western Air Lines Inc. v. Brotherhood of R.R. Employees*, 2 CCH 1969 Lab. Arb. Awards § 8761.

<sup>28</sup> *Id.*

<sup>29</sup> *Springday Co. v. United Rubber Workers Local 662*, 53 Lab. Arb. 627 (1969).

and another employee was wearing tennis shoes. Enforcement of the rule was relaxed when the long haired employee agreed to wear moccasins instead of sandals subsequent to a one-day suspension. It became clear that there were no real safety reasons for initiating the rule because moccasins provide no more safety than sandals. Back pay was ordered for time lost by the suspension.<sup>30</sup>

Another area where arbitrators balance the interests, involves an employer's interest in product quality and the employee's interest in personal appearances. In a proceeding involving the Kellogg Company, Arbitrator John Shearer held that under a plant rule barring male employees from extending their sideburns below the ear lobe or making them wider than the upper width, an employer engaged in production of cereal products was justified in discharging a carton glue operator who kept his sideburns at about one-fourth inch below his ear lobe, since (1) the rule reflects employer's growing concern for protection of its product against hair contamination rather than intent to regulate employee's appearance, and (2) the contract does not limit the right of the employer to formulate and enforce reasonable rules for protection of the product quality. The arbitrator said the prescribed length seems to represent a reasonable compromise between sanitation consideration and personal preference.<sup>31</sup>

In cases involving personal appearances, arbitrators also put heavy emphasis on the norms of the community where the company is located. In a Pacific Gas and Electrical Company arbitration, the company's rules with respect to sideburns, mustaches, goatees, Van Dykes and most other hair styles were found to be unreasonable even though the employees involved were servicemen and customer service clerks. The reasoning of this case centered around the fact that the work was performed in the San Francisco area. The arbitrator noted that San Francisco is known for its sophisticated population. He pointed out that the company could not reasonably say that the local citizens would be perturbed at the sight of muttonchop sideburns, a neatly trimmed goatee or Van Dyke, or, a mustache. The arbitrator felt that the only rule worth saving was the prohibition of full beards and mustaches extending below the mouth. He said that this type of facial hair can tend to be objectionable. The arbitrator indicated that in making personal appearance rules the company must make a realistic assessment of the environment in which it is located. It was not to unduly restrict employee's rights to appear as they pleased.<sup>32</sup>

This decision is typical of the current trend of arbitration decisions in the area of discipline involving employee attire and hair

<sup>30</sup> *Imco Container Co. v. Textile Workers Union*, 1 CCH 1971 Lab. Arb. Awards § 8007 (May 22, 1970).

<sup>31</sup> *Kellogg Co. v. Grain Millers Local 252*, 55 Lab. Arb. 84 (1970).

<sup>32</sup> *Pacific Gas & Elec. Co. v. IBEW Local 1245*, 2 CCH 1970 Lab. Arb. Awards § 8808.

styles. Arbitrators are giving more consideration to individual rights and the relationship of rules to the type of work and industry involved. Heavy emphasis is also being put on community norms and whether the job requires contact with the public. In addition, the general trend is that while providing for the needs of the company, rules concerning neatness today should reflect contemporary changes in style.

In dealing with this case, Arbitrator William Eaton faced the argument that the right of an individual to choose his own hair style may be a constitutional right. Recognizing that Pacific Gas and Electric is not a governmental institution, and that constitutional rights do not therefore apply to the company per se, the union nevertheless suggested that the existence of such rights might have a bearing on the reasonableness of the company rule at issue. The arbitrator said the union all but answered its own contention in regard to its constitutional rights analogy when it observed that Pacific Gas and Electric was not a public agency. He went on to say that while the quasi-public nature of a public utility might invite interesting speculation in the field of constitutional law, the ". . . Constitution has not yet been amended or interpreted in a manner which would allow this Arbitration Board to pursue the matter as framed in the dispute involved in this case."<sup>33</sup>

### **Constitutional Arguments for Free Expression**

In another 1970 case, a union argued that the grievant was discharged in violation of his constitutional and civil rights of personal expression and preference. Arbitrator Marlin Volz held that the interest of employees in the individuality of their personal appearance should be weighed and balanced in determining the reasonableness of the company's rules. However, he pointed out that where such rules and regulations are reasonable,

" . . . an employee has no constitutional or other right to defy or violate them except at his own risk. He may have a constitutional right to self-expression but he has no constitutional right to continued employment in clear violation of reasonable company rules."<sup>34</sup>

In another case involving a constitutional rights argument, the grievants contended that their discharge violated civil rights guaranteed by the Constitution of the United States and more particularly the 14th amendment. The case involved an airline company with the arbitrator commenting on the public's association of long hair with irresponsibility. He pointed out that loss of business can mean loss of jobs for other employees. He went on to say that:

Given an option I am sure that the framers of the Constitution of the United States would agree that the right of one employee to make a living should certainly take prece-

<sup>33</sup> *Id.* at 5704.

<sup>34</sup> *Pepsi Cola Gen. Bottlers, Inc. v. Brewery Local 20*, 55 Lab. Arb. 663, 666 (1970).

dence over another employee's right to grow long hair and a beard.<sup>35</sup>

In a case involving a supermarket where employees meet the public, it was held that under a plant rule requiring employees to have their hair groomed and arranged so that it would remain securely in place and not be unduly conspicuous, the employer was justified in discharging a male grocery clerk whose hair extended below his collar. In answer to a civil rights argument the arbitrator said:

The Tradewell rule requires that hair should not be "unduly conspicuous", and this would apply to women as well as to men. The Arbitrator feels, however, that long hair on a man might be very conspicuous, while the same length hair on a woman would not be. This is not sex discrimination in the same sense that the term is used in The Civil Rights Act of 1964. It is true that the company is applying the rule somewhat differently to men than to women, but this does not mean that the company has violated the Civil Rights Act of 1964.<sup>36</sup>

It was pointed out in this decision that the Civil Rights Act of 1964 does not require males and females to look alike. The arbitrator went on to say that he agreed with the union that the first and fourteenth amendments guarantee the individual certain rights, but he said these rights are not without restrictions. The grievant has a right to wear his hair any length he wishes, but he does not have a right to a job with the company if his hair length violates the company rules.<sup>36a</sup>

The constitutional rights argument was raised in a recent case involving a government agency. In that case a probationary officer for the City of San Francisco decided to put on his office wall a poster depicting several recent "folk heroes" who had trouble with the law. The officer claimed that the poster helped to break the ice with the people he met on the job, but a superior felt that the poster was unprofessional and in poor taste. When the employee refused to remove the poster a suspension was imposed. The union contended that the poster was a form of expression which falls within the protection of the first amendment, as applied to the states and their subdivisions by the due process clause of the fourteenth amendment. The union's sole argument was that the Probation Department's action in suspending the grievant was a violation of his constitutional rights of free speech. After reviewing court cases in the area of free speech, the committee concluded that:

While government employers may restrict the rights of free expression of their employees, such restrictions must be shown to be necessary to the proper functioning of the em-

<sup>35</sup> *Western Airlines Inc. v. Brotherhood of R.R. Employees*, 2 CCH 1969 Lab. Arb. Awards § 3761 at 5568.

<sup>36</sup> *Allied Employees Inc. v. Retail Clerks Local 1105*, 55 Lab. Arb. 1020, 1025 (1970).

<sup>36a</sup> *Id.*

ployer and they must be clearly and narrowly drawn to specifically indicate the prescribed conduct. In the present case there were no well-defined restrictions on employees' rights, as was indicated by the fact that the superior's motive for imposing the suspension was because the displayed poster was deemed "unprofessional" and "in poor taste." Neither criterion was sufficiently well defined to meet the requirements set out above.<sup>37</sup>

It was concluded that the grievant's constitutional rights had been violated and it was recommended that the employee be awarded five days' backpay with interest.<sup>37a</sup>

Constitutional rights arguments can be raised successfully where government action is involved, but it appears that the only benefit in raising such arguments where a private employer is involved is to prevail upon the arbitrator to consider them in deciding upon the reasonableness of the employer's action.

### **Balancing Interests and Obscenity**

Another area involving social change where the arbitrator is called upon to balance the employer's interest in controlling the employee's behavior and the employee's interest in retaining control over his own behavior involves the use of obscene expressions. While cases in this area are fewer than in the area of personal appearance, the evidence is strong that arbitrators are far less likely to expect an employer to tolerate obscene expressions because of the effect it has on other employees, the company's image, and the ability of management to maintain the necessary control to operate a profitable business.

In the "obscene sweatshirt" case,<sup>38</sup> the union challenged the company's right to discipline for conduct off the premises and unrelated to employment. In that case, the grievant showed up at a company-owned recreation area to participate in a night ballgame. He was wearing a sweatshirt with illuminated fluorescent white lettering on a colored background. The words reproduced on both the front and back of the sweatshirt immediately offended some of the on-lookers which included employees and their wives and a number of teenage children. In discussing the facts, Arbitrator Harry Dworkin pointed out the extreme difficulty in attempting to establish standards governing obscenity or in applying preconceived definitions to particular situations. He also pointed out that running through several published works where the use of the English language was the common theme, the meaning attributed to particular words varies with the circumstances, the times and the intent sought to be conveyed. He went on to say without going so far as to conclude that

<sup>37</sup> *Adult Probation Dept. v. City Employees Local 400*, 1 CCH 1971 Lab. Arb. Awards § 8037 at 3136 (Dec. 2, 1970).

<sup>37a</sup> *Id.*

<sup>38</sup> *Glass Containers Mfrs. Inst. v. Glass Bottle Blowers Ass'n*, 53 Lab. Arb. 1266 (1969).

the lettering on the grievant's sweatshirt was obscene per se, the circumstances definitely made them so. The arbitrator said there may be some merit to the argument that the grievant acted consistent with his constitutional rights in wearing clothing in accordance with his personal preference, however, the character of the grievant's behavior must be assessed in the context in which it occurred. The setting was not the grievant's home or some isolated area where no objection could be lodged against his somewhat unusual attire. The place selected by the grievant for his exhibition was on grounds wholly owned by the company. The arbitrator indicated that the grievant's right to conduct himself as he saw fit did not give him a license to impose his thoughts upon others by force. The arbitrator held that on the basis of the provisions of the working agreement and the plant rules, just cause was demonstrated in support of the discharge, and that the Bill of Rights did not protect a violator against the consequences of such an act.<sup>38a</sup>

in a recent case involving the Canteen Corporation,<sup>39</sup> Arbitrator M. David Keefe held that an employer was justified in discharging an employee who, in response to the employer's improper and public chastisement because of her dress, directed an obscene remark at the employer's representative and stated later that she would do the same thing again under similar circumstances. The arbitrator upheld the discharge even though he was extremely critical of the way management handled the discussions leading up to the remark and even though, in his opinion, management provoked the incident. The arbitrator made it quite clear in this case that there is a need for the employer to retain a certain amount of control over its employees' behavior.

Arbitrator Keefe indicated that the case was a clear indication of the social tensions and unrest which effect the work force today. He pointed out that the issue was much broader than an ordinary problem of every day plant life. He said the issue involved the effect of changing times and mores on in-plant relationships. In justifying his holding in this case, he said:

Modern industrial society, out of which the standard of individual personal living are created . . . is of its very nature and complexity, subject to shutdown and collapse unless the individual, human contribution to the machine operation is orderly, efficient and productive . . . (T)he total way of life in which we are enmeshed and from which we cannot escape without mass starvation and deprivation, to say nothing about the awesome dangers of conquest from outside if we destroy our internal capacity to maintain industrial leadership and production capacity, demands that the production line be maintained in an efficient continuous flow. The alternative is disaster. The means of self preservation is cooperation. The

<sup>38a</sup> *Id.*

<sup>39</sup> *Canteen Corp. v. United Catering Local 1064*, 52 Lab. Arb. 781 (1969).

individual who does not conform to the necessity for reasonable cooperation does, in his infinitesimal rebellion, strike a blow against the common way of life. This, then justifies proper rules of conduct and the imposition of discipline when infractions do occur.<sup>39a</sup>

Arbitrator Keefe went on to describe the protestors of the new age and how they planned to infiltrate industry to bring down the establishment (the combined labor-management relationship). He referred to the chaos on college campuses and said that in the industrial society, society cannot allow such norms to prevail. He said that "... [n]either Management nor Unions could survive if such pandemonium became the accepted way of life."<sup>40</sup>

It is conceivable that Arbitrator Keefe may have reinstated the grievant if she had not insisted that she would make the same obscene remark again under similar circumstances. This decision highlights the tendency of arbitrators to hold that employees do indeed give up a certain amount of personal rights when they accept employment.

### Using the Collective Bargaining Agreement

It appears that arbitrators have come a long way in permitting employees to exercise more individual rights in the area of employee attire and hair styles, but it does not appear that they are ready to accept common usage of obscene expressions in industry.

The use of obscene expressions will continue to be an area where employees assert constitutional rights, but it does not appear that they will succeed where private employers are involved. A private employer's rights to discharge are limited only by the terms of a collective bargaining agreement, by federal and state labor relations acts or by other laws dealing with discrimination. At common law, a contract of employment between an employer and an individual worker is considered terminable at the will of either party if it states no express term of employment.<sup>41</sup> A much broader curtailment on management's right to discharge is found in the collective bargaining agreements. The collective bargaining agreement's restriction on an employer's right to discharge usually is a general statement that discharge and/or discipline be for "just cause."<sup>42</sup> However, some writers say that even where the bargaining agreement is silent on the matter of discipline there is an implied understanding that the company does not have the unilateral right to discipline or discharge an individual without such action being subject to challenge by the union as to whether the company's action was for just cause.<sup>43</sup>

<sup>39a</sup> *Id.* at 789.

<sup>40</sup> *Id.* at 790.

<sup>41</sup> BNA LABOR RELATIONS EXPEDITOR § 19 at 155. *But see*, SELZNIK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 165 (1st ed. 1969).

<sup>42</sup> BNA LABOR RELATIONS EXPEDITOR § 19 at 155. *But see*, SELZNIK, LAW, SOCIETY AND INDUSTRIAL JUSTICE, 164-65 (1st ed. 1969).

<sup>43</sup> SELZNIK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 165 (1st ed. 1969).

In commenting on the employee's rights before the National Academy of Arbitrators in 1967, Associate Justice Mathew O. Tobriner of the California Supreme Court stated that the predicament of the individual employee in this time of union organization is acute. He indicated that if an employee works where a collective bargaining agreement is in force, he is wholly dependent upon the union to vindicate his rights. Furthermore, a nonunion employee, or the employee in an unorganized plant, is in an even more precarious position. "In the absence of a collective bargaining agreement forbidding discharge without cause, an employee may be without any remedy despite arbitrary discipline or discharge based on unfounded or vindictive charges or indeed upon the mere whim of management."<sup>44</sup> Justice Tobriner indicated that individuals attempting to exercise constitutionally protected rights in an employment relationship will find that due-process rights are derived from state and federal constitutions to protect individuals from state action.

"Since the arbitrator decides questions raised under collective bargaining contracts between employers and unions, he does not, except in rare instances, face the question whether the government has violated the Constitution."<sup>44a</sup>

However, the "new" doctrines of due process (notice and hearing) may well be analogous in arbitration proceedings.

Since the recent trend in arbitration cases has been to give more consideration to individual rights, a logical question arises as to just what rights the individual has in the grievance proceedings and in the courts? As was noted earlier, an employee who works in a plant which is not organized, may be without remedy for a discharge unless he can allege that the employer violated a federal labor, state labor or antidiscrimination statute.<sup>45</sup>

No cases were found where an employee of a private employer was successful in getting into court to protest a discharge based on violation of his first amendment rights. The law is fairly well settled that in order to recover for alleged violation of first and fourteenth amendment rights, it must be shown that the defendant's conduct was equivalent to either state or federal action. This normally means that an employee must be working for a government employer to successfully pursue an argument that his constitutional rights have been violated. One such case was mentioned earlier; however there is no evidence that the case went beyond the Grievance Appeals Committee provided for in Rule 56 of the San Francisco Civil Service Act.<sup>46</sup>

<sup>44</sup> Address by Associate Justice Mathew O. Tobriner in *D. JONES, THE ARBITRATOR, THE NLRB, AND THE COURTS* 39 (1967).

<sup>44a</sup> *Id.* at 41.

<sup>45</sup> *BNA LABOR RELATIONS EXPEDITOR* § 19 at 155.

<sup>46</sup> *Adult Probation Dept. v. City Employees Local 400*, 1 CCH 1971 Lab. Arb. Awards § 8037 (Dec. 2, 1970).



In a recent New York case, a bus company's rules on personal appearance was challenged in court by an Orthodox Muslim on the basis of discrimination because of creed. The rule required that employees dealing with the public must be clean shaven. The complainant was required by his religion to wear a beard. After being refused employment, he filed a claim for discrimination in violation of the New York Human Rights Law. The New York Court of Appeals held that there was no violation of the New York Human Rights Law where the employment decision was made pursuant to the Company's general policy whereby it required all its employees to be clean-shaven. The court indicated that the employment decision was not actuated by discrimination against creed.<sup>47</sup> Even though this case did not involve discipline against an employee, it is interesting to note that the "clean shaven" rule was upheld by a court against a civil rights attack.

An employee working under a collective bargaining agreement has a variety of avenues available to enforce his rights under the agreement:

1. He may be able, if he meets a certain criteria, to enforce his rights under the collective bargaining agreement by suits brought under Section 301 of the Taft-Hartley Act.<sup>48</sup>
2. He has a right to good faith representation by his union in the grievance procedure, and this right is enforceable both by the courts and the National Labor Relations Board.<sup>49</sup>

The modern view that an individual employee has standing to enforce a collective labor agreement made between the union and his employer is usually based on the ground that the employee is a third party beneficiary or on the ground that the contracting union acted as the employee's agent.<sup>50</sup>

Section 301 of the Taft-Hartley Act does not give the individual a right to enforce the labor agreement as such, but it has been interpreted that way by case law.<sup>51</sup> However, there is considerable authority for the principle that the employee must exhaust the grievance procedure or allege that the union has violated its duty of fair representation in processing a grievance before he will have standing to bring a Section 301 suit.<sup>52</sup>

If a grievance procedure is provided for in the collective bargaining agreement and a settlement of the grievance is reached at

<sup>47</sup> *Eastern Greyhound Lines Inc. v. Div. of Human Rights*, 27 N.Y.2d 279, 317 N.Y.S.2d 322, 266 N.E.2d 745 (1970).

<sup>48</sup> *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962); BNA, LABOR RELATIONS YEARBOOK 176 (1970).

<sup>49</sup> BNA, LABOR RELATIONS YEARBOOK 176 (1970).

<sup>50</sup> *Annot.*, 18 A.L.R.2d 352, 361 (1951).

<sup>51</sup> *Smith v. Evening News Ass'n.*, 371 U.S. 195, 200-01 (1962); *Annot.*, 18 A.L.R.2d 352, 354 (1951).

<sup>52</sup> *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

some step of the procedure, it has been held to be final and binding on the employee. Settlements have been affirmed even when reached between the union and company without going to arbitration and where the employee was in disagreement with the settlement.<sup>53</sup> One case held that where the employer and union had the sole right to request arbitration under a collective bargaining agreement, the individual union members had no right to apply to the court for an order directing the parties to proceed to arbitration.<sup>54</sup>

The philosophy of the Union in retaining control over disputes and of the Company in requiring the same is sound. A contrary procedure which would allow each individual employee to overrule and supersede the governing body of a Union would create a condition of disorder and instability which would be disastrous to labor as well as industry.<sup>55</sup>

If a grievance goes to arbitration, the current case law and some state statutes make the arbitrator's decision final, which cuts off any avenue to the courts for the employee except for possible action to vacate the award on grounds of fraud, undue influence or other matters justifying equitable relief.<sup>56</sup> The subject matter of the award is not a proper basis for a subsequent civil trial, and a suit can only be instituted upon the award itself.<sup>57</sup>

Some writers have referred to the arbitrator as resembling the Supreme Court.<sup>58</sup> In his recent book, *Arbitration and Labor Relations*, Clarence Updegraff said:

The courts . . . have in recent opinions expressed an extreme reluctance to review the merits of an arbitrator's decision, and usually will refuse to overrule an award where it contains a reasonable or plausible analysis of the provisions of the collective agreement and is not capricious or arbitrary. This principle, enunciated by courts on numerous occasions, finds as its source the trilogy cases and the federal labor policy encouraging the use of arbitration to promote the peaceful settlement of industrial disputes.<sup>59</sup>

It appears from the current case law that employees of private employers would not be able to get into court to argue their constitutional rights in cases involving personal appearance and use of obscene language. These arguments have been raised in the grievance procedure and arbitration cases, but it appears the employee could not get beyond the procedures outlined in the collective bargaining agreement unless proceedings under the agreement involved fraud

<sup>53</sup> *Harris v. Chemical Leaman Tank Lines Inc.*, 437 F.2d 167, 171 (5th Cir. 1970).

<sup>54</sup> *Arsenault v. General Elec. Co.*, 20 Conn. Supp. 413 137 A.2d 762, (1957).

<sup>55</sup> *United States v. Voges*, 124 F.Supp. 543, 546-47 (E.O.N.Y. 1954); citing *Bianculli v. Brooklyn Union Gas Co.*, 115 N.Y.S.2d 715, 718, 14 Misc.2d 297, 300 (1952).

<sup>56</sup> *BNA LABOR RELATIONS YEARBOOK* 132, 133 (1966); 5 AM. JUR. 2d *Arb. and Award* § 146 (1962).

<sup>57</sup> 5 AM. JUR. 2d *Arb. and Award* § 146 (1962).

<sup>58</sup> Address by J. P. Holacher, in *BNA, PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING OF NATIONAL ACADEMY OF ARBITRATORS* 173 (1962).

<sup>59</sup> C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* 287 (3rd ed. 1970).

or undue influence, or unless there is a violation of a state or federal statute by the employer.

### Conclusion

In summary it can be said that arbitrators are currently giving more consideration to the employee's individual right to retain control over his own behavior in cases involving personal appearance regulations. Arbitrators, however, are refusing to accept the use of obscene language in industry. The employer can still set standards regulating the employee's behavior in the area of personal appearance as long as the standards are clear, unambiguous and consistently enforced. The standard also must be reasonably related to the business need of the company and it must be reasonably attuned to contemporary mores and attitudes toward dress and grooming. As styles change an employer may have to change its standards.

The following survey, conducted by the author in October, 1971, indicates that management is indeed changing its attitude toward the personal appearance of employees. The survey covered 41 companies in eastern Ohio and western Pennsylvania ranging from small to large in size.

It is interesting to note that 95% of those companies (37) responding to the question, "Do you have written work rules covering these areas?", answered no. The early decisions summarized in this paper relied heavily on written work rules in sustaining disciplinary action involving personal appearance and wearing apparel.

The "absolutely forbidden" category stands out in that no companies absolutely prohibit beards, mustaches, long sideburns, or mod clothing.

	Beards	Mustaches	Long Sideburns	Long Hair	Mod Clothing
No objection at all .....	34%	46%	42%	22%	27%
No objection except in extreme cases .....	54%	44%	44%	71%	61%
Absolutely forbidden .....	..	..	..	2%	..
Forbidden only for those who come into contact with the public .....	2%	..	..	..	..
No answer .....	10%	10%	14%	5%	12%

A similar survey, but with different employers, was published in the Bureau of National Affairs December 11, 1969 issue of *Bulletin to Management*. The BNA survey was taken among 150 executives from large and small companies across the nation concerning the attitudes of their companies toward employees with beards, mus-

taches, sideburns and long hair.<sup>60</sup> The results are listed below. It should be noted that all the categories except sideburns were absolutely prohibited by various percentages of the companies involved in the survey.

	*Beards	Mustaches	Sideburns	Long Hair
No objection at all .....	13%	25%	25%	2%
No objection except in extreme cases .....	38	53	54	39
Absolutely forbidden .....	12	3	0	18
Forbidden only for those who come into contact with the public .....	9	0	2	6
No set policy, but might suggest moderation in individual talks	27	19	19	35

\*No explanation for column totaling only 99%.

Employees are not getting far with constitutional rights arguments other than to influence the arbitrator's evaluation of the reasonableness of the employer's action. If employees were able to get into court to press their first amendment rights it is doubtful that they would get any more support from the courts than they are currently getting from arbitrators. It has been fairly well accepted by arbitrators that an individual gives up a certain amount of individual rights when he enters an employer-employee relationship. Similar logic was applied by the U.S. Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968) where there was a question of constitutional rights involving the sale of obscene literature to minors. In that case the court held that regulations of communication addressed to children need not conform to the requirements of the first amendment in the same way as those applicable to adults.<sup>61</sup> From this analogy, it is conceivable that the courts would support what appears to be the arbitrator's theory that first amendment protection need not be extended to employees on the same basis as all other individuals.

<sup>60</sup> *Pacific Gas & Elec. Co. v. IBEW Local 1245*, 2 CCH 1970 Lab. Arb. Awards § 8808 at 5706.

<sup>61</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968).